REMARKS

Amendments to claims 1, 10, and 15 are for the purpose of clarifying what Applicant regards as the invention. No new matter has been added.

I. Double Patenting Rejections

Claims 1, 2, 6, 7, 10-12, 15-18, 20-30, 32-36, and 38-63 stand rejected on the ground of nonstatutory double patenting over claims 1-56 of U.S. Patent Application No. 10/656,478. Attached herewith is a Terminal Disclaimer disclaiming that portion of the term of any patent granted on the present application extending beyond the term of a patent issued from 10/656,478, to the extent that the claims issued from the '478 application are not patentability distinct from the claims issued from the subject application. It is believed that the Terminal Disclaimer overcomes the provisional double patenting rejection.

Claims 1, 2, 6, 7, 10-12, 15-18, 20-30, 32-36, and 38-63 stand rejected on the ground of nonstatutory double patenting over claims 1-47 of U.S. Patent No. 7,158,610. Attached herewith is a Terminal Disclaimer disclaiming that portion of the term of any patent granted on the present application extending beyond the term of United States Patent No. 7,158,610. It is believed that the Terminal Disclaimer overcomes the double patenting rejection.

II. Claim Rejections under 35 U.S.C. § 102

Claims 1, 2, 6-16, and 20-23 stand rejected under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Patent No. 6,690,965 (Riaziat). Applicant respectfully notes that in order to

sustain a claim rejection under § 102, each of the claim elements must be found, either expressly or inherently, in the cited reference.

Claims 1, 10, and 15 have been amended to recite that one of the first and second images is a real-time image. According to the Office Action, column 7, line 54 to column 8, line 5 of Riaziat allegedly disclose acquiring a sequence of images. However, Applicant respectfully notes that the above cited passage of Riaziat describes post processing fluoro images during a treatment planning phase, in which the fluoro images are retrospectively processed to determine tumor movement (column 7, lines 7-14 and 35-63). As such, the cited passage of Riaziat does not disclose or suggest acquiring a sequence of images in which one of the images is a real-time image. For at least the foregoing reasons, amended claims 1, 10, and 15, and their respective dependent claims, are believed allowable over Riaziat.

New claims 64 and 66 recite that the sequence of images are acquired during a treatment session. New claim 65 recites similar limitations. Notably, column 7, lines 54-63 of Riaziat disclose processing images during a treatment planning phase (see also column 7, lines 11-14), and therefore, do not disclose or suggest the limitations of claims 64-66. For this additional reason, claims 64-66 are believed allowable over Riaziat.

III. Claim Rejections under 35 U.S.C. § 103

Claims 24-27, 29-33, 34-39, 40-43, 45-48, 49-54, 55-57, 58, 59, and 61-63 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Riaziat in view of U.S. Patent Application Publication 2004/0097805 (Verard).

Applicant traverses the § 103 rejections on the grounds that 35 U.S.C. § 103(c) disqualifies Riaziat as a reference in a § 103(a) rejection against the claims of the subject application. According to 35 U.S.C. § 103(c), "[s]ubject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of [Title 35 of the United States Code], shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person." Here, the subject application was, at the time the invention of the subject application was made, owned by Varian Medical Systems Technologies, Inc (Reel/Frame: 014488/0498), which is a subsidiary of Varian Medical Systems, Inc. As such, the subject application and Riaziat were, at the time the invention of the subject application was made, owned directly or indirectly by Varian Medical Systems, Inc. Therefore, Riaziat cannot be used in a rejection under 35 U.S.C. § 103(a) against the subject claims. The remaining cited reference does not support an obviousness rejection without Riaziat. For at least this reason, Applicant respectfully requests that the § 103 rejections be withdrawn.

CONCLUSION

Based on the foregoing remarks, all claims are believed allowable. If the Examiner has any questions or comments regarding this amendment, the Examiner is respectfully requested to contact the undersigned at the number listed below.

Respectfully submitted,

Dated: May 30, 2007

By: 

Gerald Chan
Registration No. 51,541

BINGHAM McCUTCHEN LLP
Three Embarcadero Center, Suite 1800
San Francisco, CA 94111-4067
Telephone: (650) 849-4960
Telefax: (650) 849-4800